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No. 04-1446

IN THE

Supreme Court of the United States

BARBARA HILCHEY CARUSO, WIFE
OF/AND DAVID CARUSO,

Petitioners,

v.

DR. GEORGE MORRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Louisiana Fourth Circuit Court of Appeal's reversal of the judgment of the trial court thereby sustaining Respondent's exception of prescription, deprived Petitioners of any constitutionally protected interests in their causes of action for the wrongful death of their stillborn infant (i) in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and (ii) so as to deprive Petitioners of any liberty interests protected by Louisiana's Medical Malpractice Act.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of Jurisdiction	1
Concise Statement of the Case	1
1. Undisputed Factual Background	1
2. History of the Claim	4
Reasons for Denying the Petition	9
Conclusion	13

TABLE OF CITED AUTHORITIES

Cases *Page*

Corsey v. State Department of Corrections, 375 So. 2d 1319 (La. 1979) 7

Martinez v. State of California, 444 U.S. 277, 100 S. Ct. 553, 62 L. Ed. 2d 41 (1980) 12

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) 10, 11

U.S. Constitutions/Statutes/Code Articles/Court Rules

Fifth Amendment ..... i, 8, 9, 12

Fourteenth Amendment ..... i, 8, 9, 12

La. R.S. 9:5628 ..... 5, 6

La. C.C. Art. 2315.2 ..... 5, 6

Rule X of the *Rules of Supreme Court of Louisiana* 9

La. R.S. 40:1299.41 *et seq.* 4

Rule 10 of the *Rules of the Supreme Court of the United States* 11, 12

Rule 14.1(g)(i) of the *Rules of the Supreme Court of the United States* 10

STATEMENT OF JURISDICTION

Respondent contends that this Court does not have jurisdiction. The Petitioners' federal claims are not properly before this Court because they were not adequately presented to the state courts.

CONCISE STATEMENT OF THE CASE

1. *Undisputed Factual Background*

Barbara Caruso first consulted Dr. George B. Morris, III on January 18, 1991, when she presented to his office for prenatal care. She was a little over seven weeks pregnant with an estimated due date of August 31, 1991. This was a second pregnancy. The first pregnancy had been voluntarily terminated five years earlier. In March of 1991, Dr. Morris obtained a Beta Strep Screen (a culture of the cervix to detect the presence of Group B- Streptococcus, a cause of potentially life threatening prenatal infections in the United States[1]). The culture was negative with no Beta-Hemolytic Streptococci isolated. The pregnancy progressed uneventfully. On September 3, 1991, Mrs. Caruso delivered a 7lb 15oz baby girl without complication. A culture of the fetal side of the placenta revealed a moderate growth of Beta Streptococcus – presumptive Group B and scant growth of E-Coli. Mother and baby were released from the hospital in good condition with no problems related to Beta Strep.

On August 14, 1992, Mrs. Caruso returned to Dr. Morris for prenatal care in connection with another pregnancy.

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1. "GBS Infections in Pregnancy" *American College of Obstetrics and Gynecology* (ACOG) *Technical Bulletin*, Number 170-July 1992.

Her estimated delivery date was March 29, 1993. A cervical culture done on the first obstetrical visit (August 14, 1992) revealed a heavy growth of Group B Streptococcus. On February 11, 1993, another cervical culture was performed. Only normal vaginal flora were isolated. On March 25, 1993, Mrs. Caruso was examined by Dr. Morris in his office. She reported good fetal movement, fetal heart tones were normal and she was advised to call if her membranes ruptured or if she began to have regular contractions. On Monday, March 29, 1993, Mrs. Caruso returned to Dr. Morris's office. She told him that on Saturday she noted a sudden decrease in fetal movement. She was unsure about fetal movement on Sunday. On examination Dr. Morris found a severely slowed fetal heart rate (bradycardia). An ultrasound demonstrated a sluggish "quivery" heart. Mrs. Caruso was immediately sent to the delivery unit at Southern Baptist Hospital where a perinatologist (an obstetrical sub-specialist in maternal-fetal medicine) performed an ultrasound and found no fetal heart activity. Labor was induced and a stillborn male infant was delivered at 1:50 a.m. on March 30, 1993. The cause of the fetal demise was not known. Umbilical cord blood and the placenta were sent to the laboratory for culture and chromosome analysis. An autopsy was performed on the infant. Dr. Morris ordered a battery of tests in an effort to try to find the cause of the fetal death. Blood cultures were negative, cervical cultures were negative, culture of the cord revealed scant E-Coli and moderate Group B Strep. A torch titer and antibody studies were essentially negative. Chromosome studies were not revealing. The autopsy revealed no significant histologic or anatomic abnormalities. A Kleihr Betke test was 4.8 and suggestive of a possible fetomaternal bleed. This information was conveyed to Mr. and Mrs. Caruso and Dr. Morris offered to arrange for

the Carusos to meet with a perinatologist at LSU Medical Center to go over the autopsy report and the medical records in order to evaluate the possible causes of the fetal death, but the Carusos evidently did not follow through with that offer.

On April 14, 1993, Mrs. Caruso wrote to Dr. Morris acknowledging that Dr. Morris had discussed possible causes of the baby's death with Mr. and Mrs. Caruso and expressing her anticipation of meeting with Dr. Morris to review the autopsy findings and test results.

On February 2, 1994, Mrs. Caruso sent an unsigned letter to Dr. Morris requesting copies of the office records of Dr. Morris so that the records could be reviewed by "acquaintances who are obstetricians who have kindly offered to review the records simply to provide any additional insight as to the unfortunate events of [her] last pregnancy, as well as to any risks for future pregnancies."

On March 2, 1994, Mrs. Caruso sent a signed letter to Dr. Morris requesting copies of his office records. On March 16, 1994, Dr. Morris's office records were copied in their entirety and furnished to Mrs. Caruso pursuant to her signed authorization.

On March 25, 1994, Mrs. Caruso signed an authorization to obtain copies of her records from Southern Baptist Hospital for the stated purpose "Review – Possible claim".

Mrs. Caruso continued to see Dr. Morris for various conditions during 1994 and 1995. Her last visit to Dr. Morris took place in May of 1995.

2. *History of the Claim*

On June 17, 1997, plaintiffs Barbara and David Caruso filed a medical malpractice complaint pursuant to Louisiana's Medical Malpractice Act[2] (La. R.S. 40:1299.41 *et seq.*) requesting the formation of a medical review panel to review the care rendered to Mrs. Caruso in connection with the birth of her stillborn son. They contended that the cause of their son's death was because Dr. George B. Morris failed to treat the Beta Strep infection that was found pursuant to the cervical culture taken by Dr. Morris on Mrs. Caruso's obstetrical office visit on August 14, 1992. The Carusos asserted that they did not discover the alleged malpractice by Dr. Morris until June 20, 1996.

The complaint against Dr. Morris was presented to a medical review panel comprised of three obstetricians and gynecologists on March 18, 1999. After reviewing all of the evidence, the panel unanimously concluded that there was no deviation from the standard of care on the part of Dr. Morris because there was no indication for antepartum treatment of the Beta Strep infection, and further, there was no evidence that treatment for Beta Strep would have prevented the baby's death.

Despite the panel's opinion, plaintiffs filed suit in Civil District Court on June 4, 1999 for medical malpractice

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2. Louisiana's Medical Malpractice Act (the "Act") provides for a panel of three unbiased physicians to review a medical malpractice claim against any physician covered by the Act and for the panel to render an opinion as to whether or not the evidence supported the claim that the defendant physician deviated from the applicable standard of care, before suit can be brought against the physician in court.

and for the March 30, 1993 wrongful death of their stillborn infant. Because the Caruso's claim had been filed more than three years after the alleged act of malpractice and more than one year after the death of their stillborn infant, the Caruso's petition was prescribed on its face. The Carusos contended in their petition that they were precluded from filing a claim against Dr. Morris within one year of the date of the death of their child because (i) they did not learn of the alleged malpractice of Dr. Morris until June 20, 1996 and (ii) Dr. Morris did not disclose to them the "actual cause of death" or inform them of his alleged malpractice.

On July 8, 1999, Dr. Morris filed an Exception of Prescription asserting that the claims brought against him were prescribed because they were not filed within the time frames established by La. R.S. 9:5628 (which provides that medical malpractice claims must be filed within one year from the date of the act of malpractice or within one year of the discovery of the malpractice, but in all events such claims must be filed at the latest within three years from the date of the alleged act, omission or neglect) or La. C.C. Art. 2315.2 (which provides that a claim for wrongful death must be brought within one year of the date of the death of the deceased).

On December 9, 1999, a hearing on defendant's exception was held. At plaintiff's request, the Court deferred ruling on the exception to permit plaintiffs to take the deposition of Dr. Morris, following which Dr. Morris would be permitted to re-urge the exception.

Dr. Morris was deposed on November 16, 2000.

Plaintiffs took no further action regarding their suit for almost three years after having deposed Dr. Morris until October 10, 2003 when plaintiffs filed a motion to set the case for trial.

On March 2, 2004, Dr. Morris re-urged his exception of prescription. Plaintiffs timely filed an opposition to the exception and offered no suggestion that the granting of Dr. Morris's exception would deprive them of their Constitutional right of Due Process.

Dr. Morris's exception came for hearing on April 16, 2004. The court took the matter under advisement and then, without assigning reasons, denied defendant's exception on August 2, 2004. Contrary to the Caruso's assertion in their Petition for Writ of Certiorari, no findings or explanation of the trial court's reasons for the denial of the exception were provided. It is purely speculation on their part that the trial court found that any delays in discovery on the part of the Carusos were "issues of fact and credibility yet to be resolved." (Petition for Writ of Certiorari, page 3)

On August 30, 2004, Dr. Morris filed an application for supervisory writ to the Fourth Circuit Court of Appeal raising the issues of whether the medical malpractice claim against him for the wrongful death of the stillborn baby Caruso had prescribed and whether the doctrine of *contra non valentem* operated to suspend the running of prescription so that the Caruso's claim was not barred by the limits of La. R.S. 9:5628 or Louisiana Civil Code Article 2315.2. Dr. Morris contended that the trial court erred in denying the exception of prescription (1) where the claim against him was filed more than four years after the death of the plaintiffs' stillborn son and more than three years after plaintiffs obtained all information requested by them for the expressed purposes of "pursuing a possible claim."; (2) where plaintiffs produced no evidence to support a claim

that the doctrine of *contra non valentem* would operate to suspend the running of prescription (3) where there was no legal basis to support the "continuous tort doctrine" and (4) where there was no legal basis for extending the prescriptive period based on plaintiff's wrongful death claim.

The Carusos filed an opposition to Dr. Morris's supervisory writ application on September 14, 2004. They did not raise the prospect that an adverse ruling would violate any constitutionally protected interests.

On September 29, 2004, the Louisiana Fourth Circuit Court of Appeal granted Dr. Morris's writ application and found that the evidence submitted in connection with Dr. Morris's exception in the trial court supported his contention that the claim against him had prescribed and that the plaintiffs had failed to establish that the discovery exception of *contra non valentem*[3] was applicable to suspend the running of prescription against the plaintiffs' survival or wrongful death causes of action.

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3. *Contra non valentem agere nulla currit prescripto* – An ancient civilian doctrine meaning prescription does not run against a party who is unable to act and which is applicable to prevent the running of liberative prescription under four specific and limited circumstances: 1) where some legal cause prevents a court from taking cognizance of or acting on the plaintiff's action; 2) where there was some condition connected with the proceedings which prevented a creditor from suing or acting; 3) where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; or 4) where the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant – this fourth category will not except the plaintiff's claim from the running of prescription if his ignorance is attributable to his own willfulness or neglect; that is, a plaintiff will be deemed to know what he could by reasonable diligence have learned. *Corsey v. State Department of Corrections*, 375 So. 2d 1319, 1321-1322 (La. 1979).

On this basis the Court of Appeal reversed the trial court's judgment and granted Dr. Morris's exception.

On October 13, 2004, the Carusos filed a request for rehearing and a request for oral argument with the Fourth Circuit Court of Appeal. Petitioners did not assert that the ruling of the court of appeal deprived them of any constitutionally protected interests in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

On October 29, 2004, the request for rehearing was refused by the court of appeal.

On November 24, 2004, Petitioners filed an Application for Supervisory Writ with the Louisiana Supreme Court. Again, Petitioners did not assert that the ruling of the court of appeal violated their constitutionally protected interests in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. The Carusos asserted only that the court of appeal erred 1) in dismissing David Caruso's separate wrongful death claim based on defendant's allegations as to the possible knowledge of Mrs. Caruso; 2) in reversing the trial court's ruling since the legal standard of appellate review required the trial court's ruling to have been clearly erroneous and; 3) in reversing the trial court's ruling that the prescription exception required resolution of issues of fact and credibility. No constitutional objections or issues were raised.

On December 7, 2004, Dr. Morris submitted his opposition to the Caruso's Writ application.

On January 28, 2005, six Justices of the Louisiana Supreme Court denied the Caruso's writ application.[4]

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4. One Justice would have granted the writ.

REASONS FOR DENYING THE PETITION

Respondent respectfully submits that this Honorable Court should not exercise its jurisdiction in this matter because the asserted federal constitutional questions were not raised in the state court system. Specifically, the federal constitutional claims based on the Due Process clauses of the Fifth and Fourteenth Amendments have not been presented by Petitioners to any state court. The Petitioners' claim that the sustaining of the exception of prescription by the court of appeal deprived them of substantive due process as well as "liberty interests" protected by Louisiana's Medical malpractice Act were neither raised in Petitioner's Request for Rehearing and Oral Argument filed with the Fourth Circuit Court of Appeal, nor were such claims made in Petitioner's Application for Supervisory Writ to the Louisiana Supreme Court. Not only was there opportunity for Petitioners to assert these specifications of error in their Application for Supervisory Writ to the Louisiana Supreme Court, the Louisiana Supreme Court Rules (Rule X) specify that the erroneous interpretation or application of the United States Constitution or the Constitution of the State of Louisiana is one of four writ grant considerations evidencing the character of reasons for which writs may be granted. Additionally, Rule X, Section 3, 2 provides that the content of a civil writ application must contain a "statement of which of the four writ grant considerations is present in the case." Petitioners' Statement of Writ Grant Considerations specified that the court of appeal had committed manifest error of law (i) in failing to recognize two separate wrongful death claims, (ii) in summarily reversing the trial court without any showing of manifest error and ignoring the legal presumptions in favor of an action being maintained and not prescribed, and (iii) in "making suppositions and going

outside the record" while the trial court "correctly looked to the evidence". Not one single reference was made to deprivation of any constitutional right, denial of Due Process or deprivation of any liberty interests that are now asserted to be protected by Louisiana's Medical Malpractice Act. In their Application for Supervisory Writ to the Louisiana Supreme Court, Petitioners did not even indirectly reference their federal claims through citation to any case law addressing Due Process, the Constitution or any constitutionally protected interest. These matters were first, and for the only time, raised in the Petition filed with this Honorable Court.

Moreover, Petitioners have failed to comply with Rule 14.1(g)(i) of this Honorable Court which requires Petitioners to show that the federal questions raised in their Petition for Writ of Certiorari were timely and properly raised in the state court proceedings and that this Court has jurisdiction to review the judgment on a writ of certiorari. Petitioners did not comply with this rule because they cannot point to any stage in the state court proceedings or quote any portion of the record where these constitutional challenges were made.

This Honorable Court has been clear that jurisdiction of this Court to reexamine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 496-497, 101 S. Ct. 1889, 1891, 68 L. Ed. 2d 392 (1981). Such prior presentation to the state courts is warranted by the principle of comity and is also proper in order to afford the parties the opportunity to develop a record necessary for adjudicating the issue and to permit the state courts to

exercise their authority to construe state statutes so as to avoid or obviate federal constitutional challenges. *Id.* at 500, 101 S. Ct. at 1893, 1894. Thus, as this Honorable Court has stated:

> At a minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Id. at 501, 101 S. Ct. at 1894.

In the instant case, the Louisiana Fourth Circuit Court of Appeal was not presented with a federal question in response to its ruling when the Carusos requested a rehearing, nor was the Louisiana Supreme Court even presented with the question in Petitioner's Application for Supervisory Writ. Since the record shows that the federal claim was not adequately presented in the state proceedings, this Honorable Court does not have jurisdiction to reexamine the judgment of the state court.

Additionally, Petitioners have failed to establish that any of the considerations governing review on certiorari as set forth in Rule 10 of the Rules of this Honorable Court are applicable. Petitioners have not, and cannot, show that the state court of last resort has decided any important federal question at all, much less in a way that conflicts with the decision of another state court of last resort, or that the state court has decided an important federal question that has not been, but should be settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court. *Rules of the Supreme Court of the United States*, Part III, Rule 10(b)(c).

Finally, Respondent submits that the final state court rulings in this matter are fully in conformity with the Due Process Clauses of the Fifth and Fourteenth Amendments. The rulings are based in reason and do not abridge any fundamental constitutional right. This Court has ruled that a state's interest in maintaining its own rules of tort is paramount to any discernible federal interest, except perhaps an interest in protecting the individual from state action that is wholly arbitrary or irrational. *Martinez v. State of California*, 444 U.S. 277, 282, 100 S. Ct. 553, 557, 62 L. Ed. 2d 41 (1980). This Honorable Court has indicated that any right to recovery in tort is not a fundamental constitutional right requiring heightened scrutiny. Rather any such right is far from fundamental and must yield to the will of the People, as expressed through the Legislature, unless the Legislature acts in a wholly arbitrary or irrational manner. Petitioners have not challenged the constitutionally of Louisiana's statutes of repose. Rather they have petitioned this Honorable Court to (i) re-examine the rulings of state judicial proceedings where those statutes were applied to the evidence contained in the record of the trial court, and (ii) declare that the application of those statutes in this matter somehow deprived them of their constitutional right to recover damages. Of course, this Honorable Court has never ruled that the United States Constitution explicitly or implicitly guarantees recovery in tort. Petitioners have not, and cannot establish that the final rulings of the state court are grounded on legislative enactments that are without rational basis. In fact, Petitioners have failed to articulate any basis whatsoever for their contention that they have been

deprived of any "liberty interests protected by Louisiana's Medical Malpractice Act." At most, Petitioners have asserted state appellate court error consisting of allegedly erroneous factual findings or misapplication of a properly stated rule of law. No compelling reason exists for this Court to grant the Petition for a Writ of Certiorari and Respondent respectfully requests that this Honorable Court deny the instant Petition or rule that the Petitioners have not been deprived of any constitutionally protected interests.

CONCLUSION

For the above and foregoing reasons, Respondent, Dr. George B. Morris, III, respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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